IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL NO.1580 OF 1986

With

FIRST APPEAL NO.887 of 1986

HON'BLE MR.JUSTICE KSHITIJ R.VYAS

and

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAHENDRASINH BAPUBHA

Versus

STATE BANK OF INDIA

Appearance:

MR DAGLI for MR PM THAKKAR for Appellant

MR PRANAV G DESAI for Respondent No. 1

MR KG SUKHWANI for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS

and

HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 22/04/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1.0 The present appeals are directed against the judgement and order dated 31st January 1986 passed by the learned Civil Judge (Senior Division), Surendranagar, in Special Civil Suit No.35/1983.

2.0 The appellant in First Appeal No.1580/86 is the original defendant no.1, respondent no.1 is the original plaintiff and respondent no.2 is the original defendant no.2 in the aforesaid Special Civil Suit. The appellant in the said appeal is the original debtor and the respondent no.2 is the guarantor.

2.1 In First Appeal No.887/1986 the appellant is the original defendant no.2-Guarantor and respondent no.1 is the original plaintiff and respondent no.2 is the defendant no.1 who is the original debtor. For the sake of convenience, State Bank of India is referred to as the original plaintiff, original debtor is referred to as the defendant no.1 and the guarantor is referred to as the defendant no.1 in this judgement.

3.0 The case of the plaintiff was as under:

3.1 The plaintiff-respondent no.1 bank is a banking company having its principal office at Mumbai and one branch office at village Zinzuvada, Taluka Dasada. The defendant no.1 had applied for a loan for business purpose under Cash Credit limit scheme and the plaintiff bank had granted loan of Rs.1,50,000/- to defendant no.1 as working Cash Credit capital on 20.4.1979 and the defendant no.2 had stood as guarantor for the said loan. According to the plaintiff, on 20.4.1979, the defendant no.1 had executed promissory note of Rs.1,50,000/- and had also hypothecated goods of salt in favour of the plaintiff bank. The defendant no.2 had also executed deed of guarantee in favour of the plaintiff bank on the same day. The account of the defendant no.1 was kept in plaintiff bank and the entries of amounts given to defendant no.1 were debited to the said account and the amounts paid by the defendant no.1 were credited to the said account.

3.2 As per the account of the plaintiff bank as on

31.5.1982, a sum of Rs.1,37,315.76 was outstanding and the defendant no.1 had confirmed the said balance on 4.2.1983 by signing the letter of balance confirmation. Both the defendants had also signed revival letters on 25.3.1983 and had acknowledged the outstanding amount in writing.

3.3 Since the defendant no.1 had failed in making the outstanding amount of loan, the plaintiff bank served a notice dated 13.12.1983 through its lawyer, but the defendants have not responded to the said notice. Under the circumstances the plaintiff filed Special Civil Suit No.35/1985 against the original debtor and the guarantor in the Court of learned Civil Judge (Senior Division), Surendranagar for recovery of a sum of Rs.1,47,084.35ps.

4.0 The defendant no.1 original debtor has filed his written statement at Exh.19 inter alia contending that the plaintiff's suit is not true and denied that he had applied for Cash Credit Limit in Kharaghoda Branch office of plaintiff bank and the plaintiff bank had sanctioned loan of Rs.1,50,000/- on 20.4.1979 and further denied that he had executed pro-note of Rs.1,50,000/- in favour of defendant no.2 and defendant no.2 had endorsed the said pro-note in favour of the plaintiff bank. The defendant no.1 further denied that he had hypothecated the goods of salt in favour of the plaintiff bank on 20.4.1979 and hypothecation deed was executed by him in favour of the plaintiff bank. He had also denied that the defendant no.2 had executed the deed of guarantee of the loan amount and he disputed about the outstanding amount of Rs.1,37,315.76 and about the confirmation given by him. The defendant no.1 has also denied the contention that he had signed the revival letter acknowledging the debts.

4.1 The defendant no.1 further contended that if it is believed that defendant no.1 had hypothecated his goods of salt in favour of the plaintiff bank, then the goods were in custody of the plaintiff bank and therefore first of all the money realised from the sale of the said goods should be appropriated towards the outstanding dues and only thereafter the plaintiff should have filed the suit for remaining amount. According to the defendant no.1 the plaintiff has not stated anything regarding the hypothecated goods and therefore the suit is not maintainable. However, in the alternative the defendant no.1 prayed that as his financial condition was bad, he was not able to pay the entire amount at a time and therefore he should be granted installments for making the outstanding amount.

4.2 The defendant no.2-gurantor has filed his written statement at Exh.20. He contended that the transaction of loan was with Kharaghoda branch of the plaintiff and therefore the suit filed by Zinzuvada branch of the plaintiff bank is not maintainable; that the suit is barred by limitation because the defendant no.2 has not acknowledged the debts within the period of limitation of three years; that Cash Credit loan was granted to defendant no.1 against the security of heap of salt and the price of the said goods was double than the amount given by way of loan and therefore there was sufficient goods to satisfy the entire debts of the plaintiff bank. The defendant no.2 contended that the plaintiff bank has failed to satisfy the amount from the security given to the bank and therefore the suit is not maintainable. The defendant no.2 contended that one guard was kept by plaintiff bank on the heap of the salt which was hypothecated with the plaintiff bank and the bank had actual control over the goods in question and therefore the plaintiff bank was in a position to satisfy the debts from the goods given by way of security. It was alleged by the defendant no.2 that the plaintiff bank, in collusion with defendant no.1, allowed defendant no.1 to take away the goods and therefore the defendant no.2 is not liable to pay the outstanding amount as per the account. It was averred that since the plaintiff bank has not prayed for recovery of outstanding amount from the goods taken in security, according to provisions of section 139 and 141 of the Contract Act, the defendant no.2 is discharged from his liability. Defendant no.2 has denied that he had executed deed of guarantee and revival letter and that he has given reply to the notice served by the plaintiff.

5.0 Issues were framed by the trial court at Exh.21. After considering the evidence of the plaintiff at Exh.24, evidence of original debtor Shri Mahendrasinh Bapubha at Exh.44 and evidence of Shri Champaklal Kantilal Shah at Exh.53 and other relevant documents on record the Civil Judge (Senior Division), Surendranagar, by judgement and order dated 31st January 1986 decreed the suit and directed the defendants to jointly and severally pay a sum of Rs.1,47,084.35 to the plaintiff bank with running interest at the rate of 15 per cent per annum from the date of the suit till realisation. The trial court has also granted installments for making the payment.

5.0 It is against the aforesaid judgement and order the original debtor-defendant no.1 and

guarantor-defendant no.2 have filed the aforesaid First Appeals.

6.0 We have heard the learned counsel for the respective parties and have also perused the impugned judgement and the oral and documentary evidence on record.

7.0 Mr. Dagli for the appellant-original debtor has contended that the bank, though having custody of the hypothecated goods, has not taken due care and has not disposed of the hypothecated goods in spite of the fact that the goods were worth double the value of the loan amount. He, therefore, submitted that the trial court has not considered this fact and therefore the judgement and decree is illegal and valid.

7.1 We have gone through the evidence on the record and particularly the evidence of the Bank Manager. In the cross-examination the Bank Manager has not admitted any of the allegations which are made by the original debtor. On the contrary, in the cross examination of the original debtor he has admitted that he has signed the agreement at Exh.48 wherein condition no.6 reads as under:

> "As the stock will be stored in open compound, all risks and responsibilities will be upon you for any loss or damage."

The same is also admitted by the original debtor in his cross examination inasmuch as he has written to the bank stating that since he could not secure a wagon in time and because of the heavy rain, he could not repay the loan amount. He stated that since he has shifted from Kharaghoda to Zinzuvada, the account was transferred to Zinzuvada branch at his request. In this connection he had produced letter dated 3.3.1992 which bears his signature.

7.2 The defendant no.1 has clearly admitted that the salt was kept in the open plot and if it is destroyed, the defendant no.1 was solely responsible for the same and that he admitted that he had written letter dated 20.4.1979 which was signed by him. The defendant no.1 has also stated that the salt business has gone down since the last six months because of recession. He has further admitted that the bank transactions are referred in the books of accounts and he has not replied to the notice of the plaintiff bank. Though he has tried to improve upon his story that the goods were available

before the suit was filed, he has not mentioned anything about it in the written statement and he refused to clarify the said fact in his evidence.

7.3 The trial court, after considering the oral as well as documentary evidence, has recorded a finding that the defendants had executed the promissory note and defendant no.2 had stood as guarantor for the loan amount taken by the original debtor. Learned counsel for the appellant is unable to assail those findings of the trial court. The said finding of trial court is just and proper.

7.4 Mr.Dagli for the appellant has relied upon a judgement of this Court in the case of Balvantrai Chhabildas Mehta Vs. State Bank of Saurashtra, reported in 1998(2) GLH 204, wherein this Court has held that agreement clause excluding responsibility of bailee-pawnee for loss or damage caused by theft, fire, rain, flood, earthquake, lightning, enemy action, internal commotion or any other cause whatsoever, do not include shortage in weight of goods. They include only the causes beyond the control of bailee-pawnee. Looking to the facts and circumstances of the case, the ratio laid down in the said judgement will not apply to the present case inasmuch as the clause 6 excludes the liability of the bank as it clearly mentions that it is the responsibility of the debtor for loss or damage to the goods. Therefore, in our view, the judgement relied upon by the learned counsel will not help the appellant inasmuch as in the subsequent endorsement which was made in Exh.50 and 51 and confirmation of the balance due to the bank, nowhere the defendant no.1 has taken the contention regarding the loss of goods. Even the notice was not replied to which clearly establishes that this is an afterthought by the original debtor. Therefore the trial court was justified in passing the judgement and decree.

8.0 Mr. K.G. Sukhwani, learned counsel appearing for the original guarantor stated that the appellant in First Appeal No.887/86 i.e. the guarantor, has died about two years back. In that view of the matter the appeal abates and is accordingly disposed of. Appeal No.1580/86 will also abate against the original defendant no.2 and respondent no.2 of the appe
costs.

8.1 For the foregoing reasons we are in complete agreement with the appreciation of the oral and documentary evidence on record on the part of the trial

court, the conclusions drawn therefrom and the findings of fact recorded. Accordingly the First Appeal No.1580/86 is dismissed. No order as to costs.

[KSHITIJ R. VYAS, J.]

[K.S. JHAVERI, J.]

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